No. 07-1625

In The
Supreme Court of the United States

VALERIE MINER, DAVID MINER, ALEXANDER TUPAZ and LOURDES TUPAZ,

Petitioners,

v.

CLINTON COUNTY, NEW YORK, and JANET DUPREY, in her individual capacity and in her official capacity as Clinton County Treasurer.

Respondents.

On Petition for Writ of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The two questions presented involve the important constitutional issue of whether a local government can keep the surplus from a tax foreclosure sale when there has not been adequate notice and when the owner has had no opportunity to claim the surplus. The Decision by the Second Circuit creats a split between the Courts of Appeal and with state courts on these issues.

I. Did the decision of the Second Circuit allow the unlawful taking of private property by the government by property tax foreclosure without due process and equal protection? The Supreme Court holding in *Nelson v. City of New York*, 352 U.S. 103 (1956) *only* allows a profit over the amount of taxes owed when: 1) there is adequate notice of the tax foreclosure; 2) the state tax foreclosure law allows a property owner to make a claim for any profit realized at a tax foreclosure sale; and, in *dicta*, 3) there is a opportunity to redeem the property prior to the tax sale. In this case, the Petitioners were not allowed by Clinton County to make a claim for the surplus, were not given an opportunity to redeem prior to the tax sale (but after the default foreclosure order), and the Tupazes did not receive notice of the foreclosure action. In addition, the New York statute allowing local governments to keep the profit after a tax sale of private property violates equal protection of the law because in all private foreclosures, the property owner gets any excess money paid after the underlying debt is paid, while the government is allowed to keep the surplus after

a tax sale. Clinton County's predatory and aggressive taking foreclosures by default are unlawfully motivated by the wish to keep the equity in the property after the tax sale.

II. Did the decision of the Second Circuit conflict with the Supreme Court holding in *Jones v. Flowers* because Clinton County was on actual notice that the Tupazes did not sign for the certified letter containing the notice of foreclosure and Clinton County took no further reasonable measures to provide notice to them?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i.
TABLE OF CONTENTS	iii.
TABLE OF AUTHORITIES	iv.
TABLE OF APPENDICES	vi.
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
PROCEDURAL HISTORY	3
STATEMENT OF FACTS	5
REASONS FOR GRANTING THE PETITION	7
I. A TAXING GOVERNMENT CAN *ONLY* KEEP THE PROFIT FROM A TAX FORECLOSURE SALE IF: 1) THERE HAS BEEN ADEQUATE NOTICE OF THE SEIZURE OF THE PRIVATE PROPERTY, *AND* 2) THAT THE OWNER HAD AN ADEQUATE OPPORTUNITY TO MAKE A CLAIM FOR THE PROFIT	7
II. THE DECISION OF THE SECOND CIRCUIT VIOLATED *JONES V. FLOWERS* BECAUSE CLINTON COUNTY WAS ON NOTICE THAT THE TUPAZES HAD NOT SIGNED THE CERTIFIED RECEIPT FOR THE TAX FORECLOSURE NOTICE AND TOOK NO FURTHER MEASURES TO PROVIDE NOTICE	12
CONCLUSION	20

TABLE OF AUTHORITIES

Page

Cases:

Bogie v. Town of Barnet, 270 A.2d 898 (Vt. 1970) 10

Chiadez v. Gonzalez, 486 F.3d 1079 (9th Cir. 2007) 18

City of Anchorage v. Thomas, 624 P.2d 271 (Alas. 1981)..... 10

Clinton County v. Miner, 39 A.D.3d 1015 (3d Dept. 2007)..... 1

Collette v. United States of America, 247 Fed. Appx. 87 (9th Cir. 2007)..... 15

Elinor Homes Co. v. St. Lawrence, 113 A.D.2d 25 (2d Dept. 1985)..... 9

Fortney v. Petron, Inc., 1992 U.S.LEXIS 14860 (E.D.La. 1992) 18

Jones v. Flowers, 547 U.S. 220 (2006)..... *passim*

Luessenhop, Bechle, and Tupaz, v. Clinton County, 466 F.3d 259 (2d Cir. 2006)..... 1, 3-4

Matter of In Rem Tax Foreclosure Action No. 37, 462 N.Y.S.2d 113 (Sup.Ct. N.Y. Co. 1983)..... 8

Miner and Tupaz v. Clinton County 541 F.3d 464 (2d Cir. 2008)..... 1

Moore v. Durham, 240 F.2d 198 (10th Cir. 1956) 17

Mortgage Associates, Inc. v. Smith, 1986 U.S. Dist.LEXIS 16907 (N.D.Ill. 1986)... 17

TABLE OF AUTHORITIES – Continued

page

Mostan v. Commissioner of IRS, T.C. Memo 1997-155 (U.S.T.C. 1997 19

Nelson v. City of New York, 352 U.S. 103 (1956)..... *passim*

Rodriguez v. DEA, 219 Fed. Appx. 22 (1st Cir. 2007)..... 16

Taylor v. The Stanley Works, 2002 U.S.Dist. LEXIS 26892 (E.D. Tenn. 2002)..... 17

Thomas v. Town of Croydon, 761 A.2d 439 (N.H.2000)..... 9

Tu v. National Transportation Safety Board, 470 F.3d 941 (9th Cir. 2006)..... 15

Tupaz v. Clinton County, 499 F.S.2d 182 (N.D.N.Y. 2007)..... 4

Winfield v. C & C Trucking, 2003 U.S. Dist.LEXIS 12985 (S.D.N.Y. 2003)..... 18

Statutes:

28 U.S.C. § 1254 (1)..... 2

42 U.S.C. § 1983..... 2

New York *Real Property Actions and Procedures Law* §§ 1361 and 1362..... 9

New York *Real Property Tax Law* § 1131..... 6

Other Authorities:

Webster's Seventh New Collegiate Dictionary (7th ed. 1969)..... 17

TABLE OF APPENDICES

page

Appendix A – Opinion of the United States Court of Appeals for the Second Circuit, decided on September 5, 2008 ..... App. 1

Appendix B- Opinion of the Appellate Division of the Supreme Court of New York, Third Department, decided on April 12, 2007..... App. 24

OPINIONS BELOW

The initial opinion of the United States Court of Appeals for the Second Circuit regarding Petitioners Alexander Tupaz and Valerie Tupaz is reported at *Elizabeth Luessenhop, Mark Baechle, Alexander Tupaz, and Lourdes Tupaz v. Clinton County, New York, William Bingel, Janet Duprey, Charles Johnson, Jr., and Town of Mendon,* 466 F.3d 259 (2d Cir. 2006) in that consolidated case

After remand of the Tupaz case, and denial on remand by the Northern District of New York, the United States Court of Appeals for the Second Circuit denied the instant consolidated appeal in *Valerie Miner, David Miner, Alexander Tupaz, and Lourdes Tupaz v. Clinton County, New York and Janet Duprey,* 541 F.3d 464 (2d Cir. 2008)(reproduced in Appendix A).

In *Clinton County v. Miner*, 39 A.D.3d 1015 (3d Dept. 2007), the New York appellate court refused to vacate the default judgment of tax foreclosure against the Miners for not asserting a meritorious defense, even though they asked to file an answer to assert the right to any surplus at the tax sale. (Reproduced in Appendix B).

JURISDICTION

The Court of Appeals entered its Decision on September 5, 2008 and denied the Petition for Rehearing November 7, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) to

review the Circuit Court's decision on a Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall . . .be deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment

The Fourteenth Amendment to the United States Constitution provides, at Section 1, in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights,

> privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

The fundamental constitutional questions in this case are: 1) Whether a local government can confiscate the owner's equity in real property when they sell it to pay back taxes at a tax auction when the owner is not given the opportunity to claim that surplus amount, and 2) Whether it is sufficient notice of a tax foreclosure when the county learns that the owners had *not* signed for the certified letter containing the foreclosure notice and takes no further measure to provide notice. Both of the Petitioners want to pay all of their unpaid taxes and have their former properties reconveyed to them. The Courts of Appeal and state courts are split on these important legal issues. To fully appreciate the significance of these constitutional violations by Clinton County, it is essential to consider the procedural history and the uncontroverted facts.

A. Procedural History

On October 11, 2006, the Second Circuit remanded *Tupaz v. Clinton County* to the District Court for a factual determination of whether Clinton County *thought* that the Tupazes had received the notice of tax foreclosure even though the certified mail receipt was not signed.

Luessenhop, Baechle, Tupaz v. Clinton County, et al., 466 F.3d 259 (2d Cir. 2006). On remand, the District Court held, among other things, that Clinton County could keep any surplus after tax sale and that Clinton County had provided sufficient notice of the foreclosure. *Tupaz v. Clinton County*, 499 F.S.2d 182 (N.D.N.Y. 2007).

In a separate District Court action, Valerie and David Miner challenged the tax foreclosure of their property by Clinton County. They had received notice of the foreclosure, but did not pay by the stated deadline. They filed a motion in the state court to reopen the default foreclosure judgment within the statutory time period. The Miners made a claim for the surplus from the tax sale and offered to pay all back taxes owed.

The New York Supreme Court and the Appellate Division held that the Miners did not have the right to claim the surplus at the tax sale by filing an answer. These courts also held that offering to redeem the property by paying all back taxes was not a meritorious basis to reopen the default judgment. By summary judgment, the United States District Court denied their claim, holding that they had no right to the surplus and were not denied due process. The Miners appealed to the Court of Appeals.

The Second Circuit Court consolidated these two Appeals. Both Appeals raised similar issues and were based upon similar facts. The Second Circuit denied the Appeals on September 5, 2008.

The Motion for Rehearing was denied on November 7, 2008.

B. Facts

1. Tupaz

Mr. and Mrs. Tupaz owned two contiguous undeveloped parcels in Plattsburgh, Clinton County, New York. The Town of Plattsburgh assessed these properties at a total of $60,000. The Tupazes owed $2347 in property taxes on these properties for 2002. It is uncontroverted that the U.S. Postal Service returned the green certified mail card for the notice of the tax foreclosure action to Clinton County *without a signature*. The return receipt card merely has a straight line drawn through the signature box. Although Clinton County admitted that the receipt had no signature, it took no further action to notify the Tupazes of the foreclosure.

Nothing further was done by Clinton County to determine whether the Tupazes had received the notice until April 21, 2003 (two months after the default judgment had been entered on February 16, 2003), when the Postal Service provided a letter to Clinton County stating that: "The following is in response to your 4/21/2004 request for delivery information on your Certified Item . . . . There is no delivery signature on file for this item" regarding the certified notice to the Tupazes. This was *after* the Tupazes asked to redeem their property for payment of back taxes in March 2003.

Neither Mr. nor Mrs. Mr. Tupaz ever received any notice of the tax foreclosure action. They never were notified of a certified letter from Clinton County. Nor did they ever sign for such a letter.

As soon as Mr. Tupaz learned that he and his wife faced foreclosure of their property, he offered all of the unpaid taxes to Clinton County. It is uncontroverted that Clinton County refused to accept payment of back taxes from the Tupazes in return for giving them back their property. They were never notified of an opportunity to make a claim for any profit on their property.

2. Miner

The Miners live in Vermont. They have owned a parcel of land in the Town of Saranac, Clinton County, New York since approximately 1983. It is valued at $18,900. The Miners owed a total of $1717.24 in unpaid property taxes, including interest and fees. Because of health problems and family emergencies, they did not pay their property taxes in 2005 prior to the redemption deadline. The county court entered default judgment of tax foreclosure against them.

The Miners timely moved to vacate and reopen the default judgment, pursuant to New York *Real Property Tax Law* § 1131. They asked to pay their taxes, interest, and penalties, and get their property back. They also asked for any profits from the tax sale. Clinton County refused to accept the back taxes from them. The county court denied

their motion to vacate and reopen, holding that they asserted no meritorious defense, even though they wanted to assert a claim for the surplus at the tax sale. This decision was upheld by the New York appellate court.

REASONS FOR GRANTING THE PETITION

I. IN *NELSON V. CITY OF NEW YORK*, THIS COURT HELD THAT A TAXING GOVERNMENT CAN *ONLY* KEEP THE PROFIT FROM A TAX FORECLOSURE SALE IF: 1) THERE HAS BEEN ADEQUATE NOTICE OF THE SEIZURE OF THE PRIVATE PROPERTY, *AND* 2) THAT THE OWNER HAD A ADEQUATE OPPORTUNITY TO MAKE A CLAIM FOR THE PROFIT. THIS DECISION CAUSES A SPLIT BETWEEN THE SECOND CIRCUIT AND STATE COURTS AND SETS A DANGEROUS PRECEDENT IN NOT ALLOWING A PERSON TO LAWFULLY CLAIM THE EQUITY OF THEIR PROPERTY.

In *Nelson v. City of New York*, 352 U.S. 103, 110 (1956), the Supreme Court held that New York City did *not* violate the Fourteenth Amendment by keeping the surplus [1] money after selling private

[1] The surplus is the amount of money received by the government at a tax sale over the amount of delinquent taxes, interest, and penalties. It represents the amount of equity of the owner in the property and represents a "profit" to the taxing entity.

property for unpaid water bills because "adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings" *and* because the New York statute at that time allowed the owner to obtain the surplus after the tax sale.

Nelson was based upon the specific facts of that case. New York City had provided *adequate* notice to the property owner of the foreclosure proceeding. There was *no* attempt by the owner to redeem *prior* to the tax sale. New York City had a statute allowing the property owner to *recover the surplus* by filing an answer asserting that the property had a value substantially exceeding the tax due. New York City had just passed a law allowing for the reconveyance to the original owner of property taken by foreclosure. The plaintiff [Nelson] had already applied for such reconveyance. [2] Based upon those specific facts, the Supreme Court held the statute to be constitutional: "[W]e do not have here a statute which absolutely precludes an owner from obtaining the surplus proceeds of a judicial sale."

In *Matter of In Rem Tax Foreclosure Action No. 37*, 462 N.Y.S.2d 113, 114 (Sup.Ct. N.Y. Co.1983) the post-*Nelson* New York state court decision recognized: "Unquestionably, a taking of property of a value far in excess of a tax lien in

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[2] This *dicta*, regarding the right of reconveyance is essential to the actual holding in *Nelson*, because it assures that any profit is incidental to the foreclosure process, rather than being the driving motivation. The only constitutional purpose of tax foreclosure is to recoup unpaid property taxes.

satisfaction of the lien would constitute a violation of constitutional rights." The state court held that the New York City foreclosure law was not unconstitutional because, where substantial excess value is alleged, it allows a six-month delay in the foreclosure proceeding to permit the owner to sell the property, satisfy the lien, and keep the surplus value.

The purpose of the tax foreclosure laws is to ensure the collection of taxes, not to provide a profit for the taxing entities. *Elinor Homes Co. v. St. Lawrence*, 113 A.D.2d 25, 32 (2d Dept. 1985). Under the New York foreclosure law, *private* mortgage holders *must* pay any surplus from a foreclosure sale into the court. That surplus over the amount owed on the mortgage is then distributed to the former owners (or lien holders). The foreclosing party cannot keep the surplus as profit. New York *Real Property Actions and Procedures Law* §§ 1361 and 1362.

The high courts of several states hold that it unlawful for a taxing governmental unit to retain surplus value of property sold at a tax sale under state law. In *Thomas v. Town of Croydon*, 761 A.2d 439 (N.H.2000), the New Hampshire Supreme Court held that it was unconstitutional under the New Hampshire Constitution for the state to retain the substantial surplus in a tax sale. It amounted to a taking without just compensation. The court held: "Because the right to property is a fundamental right in our State, all subsequent grants of power, including the taxing power, are

limited as to how they adversely affect it." Id. at 441.

In *Bogie v. Town of Barnet,* 270 A.2d 898, 900 (Vt. 1970), the Vermont Supreme Court provided, under the Vermont Constitution:

> To withhold the surplus from the owner would be to violate the . . . Constitution and to deprive him of his property without due process of law and to take his property for public use without just compensation. If he affirms the propriety of selling or taking more than enough of his land to pay the tax and penalty and interest and costs, *and applies for the surplus money,* he must receive at least that.

In *City of Anchorage v. Thomas,* 624 P.2d 271, 273 (Alas. 1981), the Alaska Supreme Court has also held that it is a manifest injustice for the state to take the surplus value of a person's property in a tax sale.

Both the Tupazes and Miners *want* to pay all of their back taxes, interest, and penalties. The Clinton County will suffer *no* prejudice or loss of taxes if it reconveys their former properties back to them. By refusing to do so, Clinton County shows the true purpose of its predatory foreclosure practices – to make a profit over the amount of back taxes owed. To pass constitutional muster, the government must *either* allow the owner to redeem up until the day of the sale *or* to recoup any surplus

over the amount of taxes, interest, and penalties owed. The whole foreclosure procedure is tainted by Clinton County's desire to profit from it.

Because Clinton County did not provide *actual* notice of the foreclosure to the Tupazes, it is not constitutionally allowed to keep *any* profit from the tax auction of their property. In the Miner case, the property owners did get notice of the foreclosure action. However, it is uncontroverted neither the Tupazes nor the Miners were given notice that they could file an answer to claim the surplus.

Further, the Miners tried filing a claim to recoup the surplus with the county court, which was rejected by that court. Also, they were not allowed to pay the back taxes or file an answer within the 30-day period to vacate and reopen the default judgment.

Private parties foreclosing on property cannot simply keep the surplus over the amount owed after the auction. It violates due process and equal protection for Clinton County to keep the surplus in a tax foreclosure, in clear violation of *Nelson v. New York City*. Clinton County's aggressive action in keeping the surplus from foreclosure also amounts to an unlawful seizure of private property and turning it into government property without due process or equal protection. There is a clear split between this Decision and the state court decisions holding that it is a

constitutional deprivation of property to be deprived of the equity in one's private property.

II. THE DECISION OF THE SECOND CIRCUIT VIOLATED *JONES V. FLOWERS* BECAUSE CLINTON COUNTY *KNEW* THAT THE TUPAZES HAD *NOT* SIGNED THE CERTIFIED RECEIPT FOR THE TAX FORECLOSURE NOTICE AND TOOK NO FURTHER MEASURES TO PROVIDE NOTICE. CLINTON COUNTY WAS MOTIVATED BY ITS DESIRE TO MAKE A PROFIT, RATHER THAN TO COLLECT UNPAID TAXES.

In *Jones v. Flowers,* 547 U.S. 220, 229 – 231 (2006), this Court held and explained:

> We do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed.[3] If the Commissioner prepared a stack of letters to mail to delinquent taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down a storm drain, one would certainly expect the Commissioner's office to prepare a new stack of letters and send them again. No one

[3] In the instant case, Clinton County learned immediately upon receiving the unsigned certified receipt that it was likely that the Tupazes did not receive the foreclosure notice.

"desirous of actually informing" the owners would simply shrug his shoulders as the letters disappeared and say "I tried." Failure to follow up would be unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman.

By the same token, when a letter is returned by the post office, the sender will ordinarily attempt to resend it, if it is practicable to do so. . . . This is especially true when, as here, the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house. Although the State may have made a reasonable calculation of how to reach Jones, it had good reason to suspect when the notice was returned that Jones was "no better off than if the notice had never been sent." . . . Deciding to take no further action is not what someone "desirous of actually informing" Jones would do; such a person would take further reasonable steps if any were available.

. . .

It is certainly true, as the Commissioner and Solicitor General contend, that the failure of notice in a specific case does not establish the inadequacy of the attempted notice; in that sense, the constitutionality of a particular procedure for notice is assessed *ex ante*, rather than *post hoc*. But if a feature of the State's chosen procedure is

> that it promptly provides additional information to the government about the effectiveness of notice, it does not contravene the *ex ante* principle to consider what the government does with that information in assessing the adequacy of the chosen procedure. After all, the State knew *ex ante* that it would promptly learn whether its effort to effect notice through certified mail had succeeded. It would not be inconsistent with the approach the Court has taken in notice cases to ask, with respect to a procedure under which telephone calls were placed to owners, what the State did when no one answered. Asking what the State does when a notice letter is returned unclaimed is not substantively different.

This Court continued and explained:

> In response to the returned form *suggesting* that Jones had not received notice that he was about to lose his property, the State did--nothing. For the reasons stated, we conclude the State should have taken additional reasonable steps to notify Jones, if practicable to do so. The question remains whether there were any such available steps. While "[i]t is not our responsibility to prescribe the form of service that the [government] should adopt," . . . if there were no reasonable additional steps the government could have taken upon

> return of the unclaimed notice letter, it cannot be faulted for doing nothing.

Jones, at 234 (emphasis added). This Court then summarized the *Jones* decision by stating:

> There is no reason to suppose that the State will ever be less than fully zealous in its efforts to secure the tax revenue it needs. The same cannot be said for the State's efforts to ensure that its citizens receive proper notice before the State takes action against them. In this case, the State is exerting extraordinary power against a property owner--taking and selling a house he owns. It is not too much to insist that the State do a bit more to attempt to let him know about it when the notice letter addressed to him is returned unclaimed.

Jones, at 239.

In *Collette v. United States of America*, 247 Fed. Appx. 87, 88 (9th Cir. 2007), in a forfeiture case, the Court of Appeals held that when the government does not receive a "signed Green Card," it is on notice that certified mail has *not* been received and must make further attempts to serve the property owner.

In *Tu v. National Transportation Safety Board*, 470 F.3d 941, 946 (9th Cir. 2006), the Ninth Circuit construed and applied *Jones v. Flowers*. The FAA sent a letter suspending a pilot's license by certified mail. It was returned as unclaimed.

The FAA failed to re-send the letter by first class mail, even though it knew from past experience that only first class mail was received by the pilot. The court held that the FAA denied due process to the pilot:

> A reasonable agency actually desirous of notifying an individual of his right to be heard would not resort to a "mechanical adherence" to the minimum form of notice authorized by regulation in the very instance when timely notice is most crucial.

In *Rodriguez v. Drug Enforcement Administration,* 219 Fed. Appx. 22 (1st Cir. 2007), the First Circuit held that when the government knew "or had reason to know" that the certified notice would not reach the appellant, notice was inadequate.

Clinton County did not *promptly* attempt to re-serve the Tupazes when it learned that there was *no* signature on the certified receipt form. The lack of signature strongly *suggested* that the Tupazes had not received the foreclosure notice. The reasonable (and easy) thing to do would have been to remail it by ordinary first class mail. As this Court noted in *Jones*, the County promptly learned, *ex ante*, that its attempt to serve the Tupazes had not succeeded.

There was *no* evidence that Clinton County tried to confirm delivery *ex ante* until after Mr. Tupaz called them on March 31, 2004 to attempt to

pay his taxes.[4] This was over a month after the Default Judgment had been entered on February 20, 2004. Mrs. Duprey's own notes from the phone call on March 31, 2004 do not indicate that she had checked with the Post Office to confirm delivery at that time.

The documentary evidence, provided by Clinton County, conclusively indicates that it did not use the "Track & Confirm" service until April 21, 2004. It also indicates that on April 21, 2004 Clinton County learned conclusively from the Postal Service the Tupazes did *not* sign for the certified notice.

In *Mortgage Associates, Inc. v. Smith*, 1986 U.S.Dist.LEXIS 16907 (N.D.Ill. 1986), the court construed federal law requiring the use of certified mail as follows:

> This court interprets the C.F.R. provision as requiring a letter sent by certified mail in the usual way. "Certified Mail" is defined by *Webster's Seventh New Collegiate Dictionary* (7th ed. 1969) as "first class mail for which *proof* of delivery is secured . . . ."

(emphasis added). A *signed* receipt is the proof of delivery inherent in the definition of certified mail.

In *Taylor v. The Stanley Works*, 2002 U.S.Dist.LEXIS 26892, * 15 - * 16 (E.D. Tenn.2002), the plaintiff tried to effect service

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[4] The Track & Confirm Notice was dated April 21, 2004.

under the Federal Rules of Civil Procedure by certified mail. The court held there was no service because the certified receipt contained neither a delivery date nor the signature of any corporate officer or agent. Without this, there was no probative proof in the record that the certified letter was ever actually delivered. In *Moore v. Durham*, 240 F.2d 198, 199 (10th Cir. 1956), the court held that a "return receipt unsigned by the addressee was insufficient to effect valid *constructive* service." In *Fortney v. Petron, Inc.*, 1992 U.S.LEXIS 14860 (E.D.La. 1992), the court held that the return of an unsigned green return receipt card is not sufficient for service of a summons and complaint pursuant to FRCP 4(c)(2)(C)(ii). *See also*, *Winfield v. C & C Trucking*, 2003 U.S.Dist.LEXIS 12985 (S.D.N.Y. 2003)(under New York law, even if the receipt is signed, but that there is a question of *who* signed the return receipt, the court has the discretion to hold an evidentiary hearing on that question).

Further, under current Postal Service regulations (as of 1994), a *signed* receipt, with the *printed* name of the person receiving the certified letter, *is required* for certified delivery. *Chiadez v. Gonzalez*, 486 F.3d 1079, 1082, n. 3 (9th Cir. 2007)("Whether on a Postal Service delivery record or on a receipt returned to the sender, an illegible signature may compromise the value of the service for which the sender paid; the proposed new standard is designed to avoid that potential problem. Because most persons can provide a printed name that is more legible than their

handwritten signature, the Postal Service believes the former will be valuable to the sender in those instances when it becomes necessary to identify the person who received an accountable mailpiece.")

When mail is sent by certified mail the recipient *must* sign a PS Form 3849, November 1999, to get delivery. USPS Domestic Mail Manual, Sec. 42.1. This receipt has a line for the signature of the recipient, the printed name of the recipient, and the delivery address. *See, e.g., Mostan v. Commissioner of IRS*, T.C. Memo 1997-155 (U.S.T.C. 1997)(a signed Form 3849 is *the* official evidence that a person has signed for and received certified mail).

In the instant case, it is uncontroverted that the Tupazes did *not* sign a certified mail receipt. Clinton County *knew* that there was no signed receipt. It would have been easy for Clinton County to re-send the letter with the notice of foreclosure by first class mail when it learned the receipt was unsigned. Instead, *because they wanted to profit from the foreclosure sale,* it did nothing. This violates due process, as enunciated by this Court in *Jones v. Flowers.* As a matter of law, when the government knows that the certified receipt is unsigned (and that the Postal Service does not have a signed receipt), they must do more to pass constitutional muster. This is especially true, as here, where the stakes are so high for the property owner. There are no reported cases from any other Court of Appeals holding, as a matter of law, that

no further notice should be given when the certified mail receipt is returned to the sender unsigned.

CONCLUSION

The Decision of the Second Circuit allowing a government to seize private property for unpaid taxes and keep the owners equity has pernicious and far-reaching legal implications. The Decision causes a split between the Second Circuit and other circuit courts of appeal and state courts. Also, this case presents an issue of overwhelming importance, whether a government can seize the equity in private property without punctiliously complying with the Constitution and state laws. This Court should grant the Petition for a Writ of Certiorari and reverse the decision of the Second Circuit Court of Appeals.

Respectfully submitted,

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VALERIE MINER, DAVID MINER, ALEXANDER TUPAZ, AND LOURDES TUPAZ, Plaintiffs-Appellants, v. CLINTON COUNTY, NEW YORK, AND JANET DUPREY, IN HER INDIVIDUAL CAPACITY AND IN HER OFFICIAL CAPACITY AS CLINTON COUNTY TREASURER, Defendants-Appellees.

Docket Nos. 07-1625-cv (L); 07-2461-cv (CON)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

541 F.3d 464, 2008 U.S. App. LEXIS 18925

May 22, 2008, Argued
September 5, 2008, Decided

COUNSEL: MARK SCHNEIDER, Plattsburgh, NY, for plaintiffs-appellants.

ROBERT A. RAUSCH, Maynard, O'Connor, Smith & Catalinotto, LLP, Albany, NY, for defendants-appellees.

JUDGES: Before: CABRANES, KATZMANN, and B.D. PARKER, Circuit Judges.

OPINION BY: JOSE A. CABRANES

OPINION

[*466] JOSE A. CABRANES, *Circuit Judge:*

In two actions brought under *42 U.S.C. § 1983*, plaintiffs Alexander and Lourdes Tupaz and Valerie and David Miner allege violations of their rights to

due process and equal protection of the laws as a result of Clinton County's enforcement of various foreclosure provisions of New York's Real Property Tax Law. We consolidated their [*467] cases on appeal from the United States District Court for the Northern District of New York (Thomas J. McAvoy and Gary L. Sharpe, *Judges*) due to overlapping claims against the same defendants and now affirm the District Court's entries of judgment in favor of the defendants on all claims.

As explained in greater detail below, plaintiffs do not have a due process right to actual notice of foreclosure. They are entitled to notice that is reasonably calculated under the circumstances [**3] to reach the intended recipients, alert them to a pending foreclosure, and advise them of an opportunity to be heard. Clinton County did not violate plaintiffs' right to due process where, as here, the County sent a notice of foreclosure by certified mail and reasonably believed that the notice had been delivered. Plaintiffs were not entitled to additional notice of default judgment, to an additional opportunity to redeem their property after foreclosure, or to a share of any profits from a tax sale for the same reason: Clinton County provided plaintiffs with the process they were due by sending a notice of foreclosure that "was reasonably calculated to reach the intended recipient when sent." *Jones v. Flowers, 547 U.S. 220, 226, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006)*. We also find no violation of the right to equal protection of the laws in the County's refusal to permit taxpayers to redeem their property by paying the back-taxes after default judgment has been entered or its refusal to grant plaintiffs a share of any surplus from a tax sale because plaintiffs have not submitted evidence

showing adverse treatment on an impermissible basis compared with persons who were similarly situated. Finally, we conclude that [**4] the County's requirement that long-overdue tax payments be submitted in the form of cash, money order, or certified check does not violate due process.

BACKGROUND

Unless otherwise stated, the following facts are not disputed.

The Tupazes

The Tupazes purchased two undeveloped properties in the Town of Plattsburgh, Clinton County, New York, in 1987. Since that time, these properties have been the subject of three tax foreclosure proceedings. The instant dispute arises from the alleged failure of defendants Clinton County and Janet Duprey, the Clinton County Treasurer, to give adequate notice of the foreclosure associated with unpaid property taxes from 2002.

Between May 2002 and February 2003, defendants sent five letters by first class mail to the Tupazes notifying them of their overdue taxes. *See Tupaz v. Clinton County, 499 F. Supp. 2d 182, 184 (N.D.N.Y. 2007).* The final letter, sent on February 11, 2003, warned the Tupazes that if their 2002 taxes were not paid by October 10, 2003, the County would initiate foreclosure proceedings. Each of the letters was addressed to the Tupazes at their home in Staten Island, New York--the address that appeared on record in the county tax rolls and [**5] where defendants had sent previous notices of foreclosure. *Id.* None of the letters were returned as un-

deliverable. *Id.* The Tupazes contend that they never received these letters, although they acknowledge that the County's record of their home address was correct.

Having received no response from the Tupazes, in October 2003, defendants included the Tupazes in a list of all delinquent taxpayers to whom they sent a Notice and Petition of Foreclosure (the "Notice" or "Notice of Foreclosure"), indicating that the final date for redemption of the property by paying the overdue taxes was January 16, 2004. *Id.* The [*468] Notice was sent to the Tupazes' Staten Island address via certified mail. [1] *Id.* Defendants subsequently received a delivery receipt for the Notice of Foreclosure, indicating that the letter was delivered on October 16. The delivery receipt did not contain a legible signature from the recipient indicating who received the package. Instead, the "Signature" box had a line drawn within it and did not otherwise contain a readily identifiable signature. In addition to the Notice, defendants published notice in two Clinton County newspapers pursuant to *New York Real Property Tax Law § 1124.* [**6] *Id.*

> 1 For the relevant time period, New York law required that only one notice be sent by certified mail. *See N.Y. Real Prop. Tax Law § 1125* (2005). The statute was subsequently amended to require that *two* notices of foreclosure be sent, either by certified mail and first class mail or both by certified mail. *See N.Y. Real Prop. Tax Law § 1125 (1)(b)* and *(5)* (2008).

While the parties dispute whether the Tupazes received the Notice, there is no dispute that defendants believed that it had been delivered. *See id. at*

185. Defendant Janet Duprey, the Clinton County Treasurer, attested that upon receiving the receipt, she presumed that "the mailing ha[d] indeed been delivered and received." *Id.* (quoting Affidavit of Janet L. Duprey ("Duprey Affidavit") P 14). Duprey further "assumed that the plaintiffs had indeed received the Notice" because they "had received numerous prior letters and warnings" at the same address. (Duprey Affidavit P 22.) She testified that, pursuant to standard practice for confirming illegible signatures, the County Treasurer's office confirmed, by checking the United States Postal Service website, that the Notice was delivered on October 16, 2003 within the zip code [**7] applicable to the Tupazes' residence. [2] After comparing the "signature" on the October 16 delivery receipt to previous delivery receipts for notices of foreclosure that had been sent to the Tupazes' Staten Island address, she concluded that previous notices had been accepted with equally indecipherable markings. According to Duprey, it was "not at all unusual to receive a certified mail receipt with an illegible signature or simply a mark in the signature box *indicating its receipt."* (Duprey Affidavit, P 14 (emphasis added).) She was not aware of any other factor that would have suggested a failure to deliver the Notice.

2 In her deposition testimony of August 2005, Duprey stated that she did not remember who checked the website or when exactly the website was checked in this case, but in her December 2006 affidavit she stated that someone in the County Treasurer's office checked the website "on th[e] same day [on which they re-

ceived the delivery receipt] or shortly therea ter." (Duprey Affidavit, P 13.)

The Tupazes did not pay the overdue taxes, r deem the property, or otherwise respond by the a pointed date, and the County initiated foreclosu proceedings in the County Court of Clinton [** County. On February 20, 2004, the County Court e tered a default judgment of foreclosure against t Tupazes as well as several other taxpayers who ha not redeemed their property. *Tupaz, 499 F. Supp. 2 at 186.* The County did not send the Tupazes a noti of judgment [3] and the Tupazes [*469] learned of t foreclosure in March 2004, when Mr. Tupaz calle the County Treasurer's office and was told that t County had foreclosed on the properties. *Id.* The T pazes contend that this call was the first time the learned that they owed taxes and that the Count had instituted foreclosure proceedings. Duprey a tested that, during this phone call, Mr. Tupaz admi ted that he had signed the October 2003 delivery r ceipt.

3 New York state law does not require suc notice. *New York Real Property Tax Law 1131* states:

> In the event of a failure to redeem or answer by any person having the right to redeem or answer, such person shall forever be barred and foreclosed of all right, title, and interest and equity of redemption in and to the parcel in which the person has an interest and a judgment in foreclosure may be taken by default as

> provided by subdivision three of section eleven hundred thirty-six of [**9] this title. A motion to reopen any such default may not be brought later than one month after entry of the judgment.
>
> We have previously held that this provision does not require service of the default judgment of tax foreclosure in order to begin the thirty-day period within which a motion to reopen must be filed when the government has given notice of foreclosure. *See Weigner v. City of New York, 852 F.2d 646, 652 (2d Cir. 1988).*

Shortly thereafter, the Tupazes sought to vacate the foreclosure and set aside the default judgment in state court. After concluding that the Tupazes were properly served with notice of foreclosure and that their motion to reopen proceedings was time-barred under the applicable statute of limitations, the court denied their request in a decision which was subsequently affirmed on appeal. *See In re Foreclosure of Tax Liens by County of Clinton, 17 A.D.3d 914, 914-15, 793 N.Y.S.2d 596 (N.Y. App. Div. 3d Dep't 2005).*

The Tupazes then brought this *Section 1983* action in the United States District Court for the Northern District of New York, claiming that defendants' alleged failure to serve them with notice of the foreclosure deprived them of due process of law and that the state [**10] statute providing for personal notice of foreclosure is unconstitutional. The District Court (Thomas J. McAvoy, *Judge*) concluded that the Tax Injunction Act, *28 U.S.C. § 1341*, deprived it of subject matter jurisdiction over challenges to the en-

forcement of state tax law and, in the alternative, that the Notice of Foreclosure did not violate due process. The Tupazes then filed a timely appeal in our Court.

On appeal, we concluded that the District Court had subject matter jurisdiction to resolve the Tupazes' claims. *See Luessenhop v. Clinton County, 466 F.3d 259, 264-68 (2d Cir. 2006).* [4] We remanded the case for reconsideration of the Tupazes' due process claims in light of the Supreme Court's intervening decision in *Jones v. Flowers, 547 U.S. 220, 225, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006)* (holding that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so"). *See Luessenhop, 466 F.3d at 271-72.* We ordered that, on remand, the District Court make a finding as to whether the County thought that the Notice of Foreclosure had failed to reach the Tupazes and, if [**11] so, whether their "failure to act is excused because [the first class] letters presumably had reached their desired destination." *Id. at 272.*

4 The other plaintiffs in the *Luessenhop* appeal, whose claims were previously consolidated with the Tupazes' in order to resolve a common question of subject matter jurisdiction, are not parties in this appeal. *See Luessenhop v. Clinton County, 466 F.3d 259, 262-64 (2d Cir. 2006).* The Miners, who are joint appellants in this appeal, were not parties in the *Luessenhop* appeal.

On remand, the District Court considered additional evidence and arguments, including the Duprey Affidavit, and granted summary judgment in favor of defendants. The Court determined that "[t]here is no evidence presented from which a reasonable fact finder could conclude that Defendants had any reason to believe that the Plaintiffs" had not received [*470] the Notice. *Tupaz, 499 F. Supp. 2d at 188.* The Court noted that neither the Notice nor the previous mailings had been returned. *Id.* It further reasoned that any suspicions about the line in the signature box were reasonably resolved by the confirmation on the Postal Service website. *Id.* Finally, the District Court observed that "there [**12] is no evidence that . . . anyone at Clinton County was aware of any facts before the final date of redemption that [the Tupazes] did not receive adequate notice." *Id. at 189.*

On that basis, the Court concluded that defendants had provided sufficient notice of the foreclosure to satisfy the requirements of due process. *Id. at 190.* The Court also concluded that *New York Real Property Tax Law § 1125*, which requires only certified mailing of a notice of foreclosure but does not require a return of the mail receipt, is consistent with the standard set forth in *Jones* for due process. *Id.* Citing our decision in *Weigner v. City of New York, 852 F.2d 646, 652 (2d Cir. 1988)* (concluding that due process does not require notice of the entry of foreclosure judgment where the property owner received notice of the foreclosure proceedings and an opportunity to respond), the Court rejected the Tupazes' challenge to the constitutionality of *New York Real Property Tax Law§ 1131. Tupaz, 499 F. Supp. 2d at 190.* The Court further concluded that neither

due process nor equal protection required that property owners be given a right to redeem their property after foreclosure. *Id. at 190-91.* In considering [**13] their claim that due process required they be given a right to any surplus proceeds obtained by the County in excess of the amount of taxes owed, the District Court ruled that the Tupazes lacked standing to bring this claim because the property had not yet been sold and the County had not yet obtained any surplus proceeds. *Id. at 192.* The Court also observed that, assuming that the Tupazes had standing, due process did not require that plaintiffs be afforded a right to any surplus. *Id.*

This appeal followed.

The Miners

It is undisputed that the Miners received notice of the foreclosure on their property also located in Clinton County. Defendants sent a notice of foreclosure in October 2005, indicating that the Miners were required to pay the overdue taxes from the previous two years by January 2006. The notice also stated that the only methods of acceptable payment were cash, money order, or certified check. The Miners did not pay the taxes by the due date and defendants initiated default proceedings in the County Court for Clinton County.

It is undisputed that, in March 2006, Mrs. Miner called the County Treasurer's office and was informed that default judgment had not been entered but [**14] was expected to be entered the next day. Mrs. Miner did not pay anything, and the County Court entered the order of foreclosure on March 10, 2006. The Miners subsequently sought to reopen the

foreclosure proceedings in order to vacate the judgment in County Court, but their request was denied. This decision was affirmed on appeal. *See Clinton County v. Miner, 39 A.D.3d 1015, 1015-16, 833 N.Y.S.2d 715 (N.Y. App. Div. 3d Dep't 2007)*

The Miners also filed a *Section 1983* action in the United States District Court for the Northern District of New York. They claimed that their rights of due process and equal protection require that the default judgment be vacated; that defendants should reconvey the property for full payment of the taxes owed; and that, if the property is not reconveyed, they should be permitted to retain any surplus obtained at a foreclosure sale of their [*471] property. They also argued that New York's Real Property Tax Law is unconstitutional to the extent that it does not permit vacatur of the judgment, reconveyance of the property, and the right to retain any surplus. Finally, they objected to defendants' refusal to accept a personal check as payment for overdue taxes.

In an oral ruling, the [**15] District Court (Gary L. Sharpe, *Judge)* granted defendants' motion for summary judgment.. The Court concluded that the County was under no legal or constitutional obligation to sell the property back to property owners after foreclosure. With respect to the Miners' claim that they should be allowed to recoup the surplus, the Court held that "[w]here adequate steps are taken to notify the owners . . . the county is not compelled to return the surplus from a tax sale." (Transcript of Miner Hearing, April 12, 2007, at 20.) Finally, the Court ruled that the County's requirement that delinquent taxes be paid by cash, money order, or certified check was constitutionally acceptable. This appeal followed.

DISCUSSION

As we have observed on many occasions, "[w]e review *de novo* a district court's grant of summary judgment." *McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 202 (2d Cir. 2007).* Summary judgment is appropriate only if "there is no genuine issue as to any material fact." *Fed. R. Civ. P. 56(c).* "A fact is material when it might affect the outcome of the suit under governing law. An issue of fact is genuine if the evidence is such that a reasonable jury could [have] return[ed] a verdict [**16] for the [appellant]." *McCarthy, 482 F.3d at 202* (internal citations and quotation marks omitted). In reviewing the record, we "resolve all ambiguities, and credit all factual inferences that could rationally be drawn, in favor of the party opposing summary judgment." *Id.* (internal quotation marks omitted). Although the burden of demonstrating that no material fact exists lies with the moving party, "[u]nless the nonmoving party offers some hard evidence showing that its version of the events is not wholly fanciful, summary judgment is granted to the moving party." *Id.* (internal quotation marks and brackets omitted).

Notice of Foreclosure

The Tupazes contend that defendants knew or should have known that the Notice of Foreclosure did not reach the Tupazes and that, in light of that fact, defendants' failure to take additional steps to give notice was a violation of the Tupazes' right to due process pursuant to *Jones v. Flowers, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006).*

In the context of real estate foreclosures, due process does not require actual notice. *Dusenbery v. United States, 534 U.S. 161, 170, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002)*. Rather, the government must provide "notice reasonably calculated, under all the circumstances, to [**17] apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)*. Indeed, "[t]he reasonableness and hence the constitutional validity of [the] chosen method [of notice] may be defended on the ground that it is in itself reasonably certain to inform those affected." *Id. at 315*; *see also id.* ("[W]hen notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."). In *Jones*, in which a notice of foreclosure and a notice of tax sale were returned and stamped "unclaimed," the Supreme Court [*472] recognized that the government may have additional obligations "when the government becomes aware prior to the taking that its attempt at notice has failed." *547 U.S. at 227*. Accordingly, when the government has "promptly [acquired] additional information" that its notice of foreclosure failed to reach the intended recipient, *id. at 231*, it "must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Id. at 225*; [**18] *see also id. at 229* (observing that, in such circumstances, "[n]o one 'desirous of actually informing' the owners" of the pending foreclosure and sale would "do nothing when a certified letter sent to the owner is returned unclaimed" (quoting *Mullane, 339 U.S. at 315*)). [5]

5 In *Jones*, the Arkansas Commissioner of State Lands sent a notice of foreclosure to Jones by certified mail after Jones had failed to pay his property taxes. *547 U.S. at 223*. Prior to the late payments that prompted the notice, Jones had no history of delinquent property tax payments. *Id.* No one was at Jones' home to sign for the notice of foreclosure when delivery was attempted, and the Postal Service ultimately returned the letter to the Commissioner as "unclaimed." *Id. at 224*. Two years later, Jones' property was scheduled for a tax sale. The Commissioner sent a notice of sale to the same address by certified mail; this notice was also returned as "unclaimed." *Id.* The Supreme Court likened these circumstances to a case in which "the Commissioner prepared a stack of letters to mail to delinquent taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down [**19] a storm drain." *Id. at 229*.

The Tupazes interpret our statement in *Lussenhop* that the District Court was required to "ask . . . whether the County *thought* that the Tupazes had received notice," *466 F.3d at 272*, to require a finding of defendants' subjective intent. We now clarify that a District Court is required to examine whether a defendant's belief was objectively reasonable under the circumstances. *See Jones, 547 U.S. at 226* (requiring "notice reasonably calculated, under all the circumstances" (quoting *Mullane, 339 U.S. at 314*)).

The record in this case compels the conclusion that defendants reasonably believed that the Notice of Foreclosure reached the Tupazes. We agree with

the District Court that the Tupazes presented no evidence that "anyone at Clinton County was aware of any facts before the final date . . . that [the Tupazes] did not receive adequate notice." *Tupaz, 499 F. Supp. 2d at 189.* The Notice, which had been sent by certified mail, was never returned to defendants. *Cf. Jones, 547 U.S. at 224* (noting that two notices had been returned and stamped "unclaimed"). In addition, none of the previous letters sent by first class mail to the Tupazes' home in Staten Island had [**20] been returned, creating a presumption that they had been delivered to the correct address. *See Akey v. Clinton County, 375 F.3d 231, 235 (2d Cir. 2004)* ("Where . . . the County provides evidence that the notices of foreclosure were properly addressed and mailed in accordance with regular office procedures, it is entitled to a presumption that the notices were received."). Moreover, defendants reasonably relied on the certified mail delivery receipt which indicated that the Notice had been delivered. As the District Court determined, any suspicions about the line within the signature box were resolved by the confirmation on the Postal Service website, which "verifl[ied] that the certified mail had been delivered and received." *Tupaz, 499* [*473] *F. Supp. 2d at 188.* [6] Defendants also relied upon their previous dealings with the Tupazes and prior experience serving notice. The Tupazes, who had twice before been threatened with foreclosure, had responded to previous notices, for which delivery receipts had been returned with similarly illegible signatures. *Cf. Jones, 547 U.S. at 223* (noting that taxpayer had no history of delinquent property tax payments).

6 While the Tupazes dispute the fact that [**21] the defendants checked the website in October 2003, they have provided no "hard evidence" to support this dispute. *McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 202 (2d Cir. 2007).* The Tupazes do not contest the assertion that the Postal Service website indicated that a delivery occurred. Instead, they contend that Duprey or someone from the County Treasurer's Office did not check the Postal Service's website in October 2003 as Duprey contends. To support this contention, the Tupazes point to a website printout obtained from defendants displaying a date stamp of April 21, 2004. They infer from the printout that defendants checked the website *only* after the default judgment, not when they received the delivery receipt.

We agree that the website printout shows that defendants checked the Postal Service website in April 2004, but we disagree that it proves they did not check the website in October 2003. To the contrary, Duprey testified at her deposition that whenever her office encountered a questionable signature, which happened with some regularity, it was a routine procedure to verify delivery on the Postal Service's website. Although she could not remember at her deposition when [**22] exactly this procedure had been undertaken in the Tupazes' case, Duprey clarified in her subsequent affidavit that the Postal Service website was checked "on that same day" her office received the Tupazes' delivery receipt "or shortly thereafter." (Duprey Affidavit P 13.) The April 21, 2004

> printout does not contradict Duprey's sworn recollection and the Tupazes have not come forth with any basis in the record to doubt Duprey's credibility.
>
> Accordingly, we find no error in the District Court's reliance on Duprey's affidavit in this regard.

The Tupazes argue that service by certified mail cannot satisfy the requirements of due process unless the delivery receipt is completed with an identifiable signature. We cannot agree. Although some courts have held the absence of a signature on a delivery receipt may defeat a presumption of delivery, *see, e.g., Moore v. Dunham, 240 F.2d 198, 199 (10th Cir. 1956)* (holding that, under Oklahoma law, an unsigned return receipt was insufficient to establish valid service), we can find no support for the proposition that the signature must be identifiable. Indeed, under the standard established in *Mullane* and reaffirmed in *Jones,* a reasonable person "desirous [**23] of actually informing" a taxpayer of a pending foreclosure would not require a legible signature where, as here, delivery was confirmed using other means. *Jones, 547 U.S. at 229* (quoting *Mullane, 339 U.S. at 315*). Defendants took the "additional reasonable steps," *Jones, 547 U.S. at 234,* of confirming the delivery on the Postal Service website and comparing the October 2003 delivery receipt to receipts from prior successful deliveries.

In the circumstances presented here, we agree with the District Court that Clinton County provided adequate notice to the Tupazes. Accordingly, there was no violation of the Tupazes' right to due process.

New York Real Property Tax Law § 1131

The Tupazes contend that *New York Real Property Tax Law § 1131* violates the constitutional guarantee of due process of law because it does not mandate service of notice of a default judgment of tax foreclosure where notice of foreclosure has been served. We rejected a similar claim in *Weigner v. New York, 852 F.2d 646, 652 (2d Cir. 1998)* and see no reason to reconsider that decision. The District [*474] Court properly relied on our holding in *Weigner* that "'due process only requires notice of the pendency of the action and [**24] an opportunity to respond' and does not require municipalities 'to send additional notices as each step in the foreclosure proceedings [is] completed.'" *Tupaz, 499 F. Supp. 2d at 190* (quoting *Weigner, 852 F.2d at 652*). We agree with the District Court. To the extent that the Tupazes argue that actual notice was required, we also reject that premise. *See Jones, 547 U.S. at 226* ("Due process does not require that a property owner receive actual notice before the government may take his property.").

Right to Redemption after Foreclosure Deadline

Both the Tupazes and the Miners argue that they were deprived of their rights to due process and equal protection because defendants did not permit a reasonable time for reconveyance after the default judgments were entered.

We agree with the District Court in both cases that defendants did not infringe on plaintiffs' rights to due process or equal protection by denying them rights of redemption after the default judgments were entered. Defendants provided plaintiffs ade-

quate notice of foreclosure and an opportunity to be heard, which is all that due process requires. *See Tupaz, 499 F. Supp. 2d at 191.* Once judgment was entered, plaintiffs lost their [**25] rights to the property under New York law and had no further right to redemption. *Id.; see also N.Y. Real Prop. Tax Law § 1131* (extinguishing "all right, title, and interest and equity of redemption" in a foreclosed property). We find no due process violation because defendants received adequate notice and an opportunity to be heard prior to the default judgment.

To maintain an equal protection claim, plaintiffs were required to show "adverse treatment of individuals compared with other similarly situated individuals [and that] such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Bizzarro v. Miranda, 394 F.3d 82, 86 (2d Cir. 2005)* (internal quotation marks omitted). Neither the Tupazes nor the Miners have shown that defendants treated them adversely compared with similarly situated property owners, nor have they shown that any adverse treatment was based on impermissible considerations. New York law expressly permits counties to establish a deadline for redemption and to reject offers of payment after that date. *See N.Y. Real Prop. Tax Law § 1110(1)* [**26] (limiting payment of tax lien to a period *"on or before* the expiration of the redemption period" (emphasis added)). The fact that other counties may allow redemption after judgment is insufficient to sustain an equal protection claim against Clinton County. We therefore agree with the two district judges that plaintiffs have not established vio-

lations of their rights to due process and equal protection.

Retention of Surplus From Tax Sale

The Tupazes and the Miners also seek redress for an alleged infringement of their rights to due process and equal protection because Clinton County will not allow them to retain the surplus proceeds from the tax sale, *i.e.,* the amount of the sale less unpaid taxes, fees, and penalties. In support of their equal protection claim, they also contend that Clinton County has engaged in "predatory foreclosure practices" in order to raise additional revenue.

[*475] The District Courts in both cases properly dismissed plaintiffs' claims for a share of any surplus. [7] The retention of any surplus from a tax auction is constitutional because there was no violation of plaintiffs' right to due process related to the notices of foreclosure. *See Nelson v. City of New York, 352 U.S. 103, 110, 77 S. Ct. 195, 1 L. Ed. 2d 171 (1956)* [**27] ("[N]othing in the Federal Constitution prevents [foreclosing on a property and retaining a surplus from a tax auction] where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings.").

7 It is likely that the Tupazes do not have standing because the Tupazes' properties have not been sold and there is no indication that a sale has occurred or is imminent, *see Tupaz, 499 F. Supp. 2d at 185.* However, we do not address this issue because we conclude that, even if the Tupazes had standing to bring this claim, there was no violation of their right to due process.

Regarding their equal protection claims, the record does not support a conclusion that Clinton County has discriminated against plaintiffs on an impermissible basis compared to similarly situated tax payers. *See Bizzarro, 394 F.3d at 86.* The evidence offered to show that the County harbored an impermissible, profit-driven motive is merely a recitation of the amounts retained in tax foreclosure proceedings in the last several years. Proof that the County routinely retains the surplus from tax sales--a practice which the Supreme Court approved over fifty years ago in *Nelson*--does [**28] not indicate a discriminatory intent.

Method of Payment

Finally, the Miners allege that their right to due process was impaired because defendants refused to accept a personal check as payment for the overdue taxes, allegedly in violation of *New York Real Property Tax Law § 1125.* The District Court rejected this claim without elaboration. (Transcript of Miner Hearing, at 20.) On appeal, the Miners rely on an opinion by the New York State Comptroller stating that "a town may not adopt a local law which permits its tax collecting officer to refuse to accept a personal check and requires that payment be made by certified check, money order or bank check." Office of the State Comptroller, Op. No. 87-34 (Apr. 30, 1987), 1987 N.Y. St. Comp. 53, 1987 N.Y. Comp. LEXIS 150. [8]

8 We are not aware that any court has addressed the Comptroller's opinion or analyzed the underlying issue in the twenty years since the opinion was issued.

Taken on its face, the Comptroller's opinion does not necessarily apply to a situation where, as in the Miners' case, a county permits payment by personal check for on-time payments but requires a certified check for late payments. [9] The statute cited by the Comptroller [**29] in support of his opinion does not provide any guidance on the permissible methods of payment for overdue property taxes. *See N.Y. Real Prop. Tax Law § 924* ("The collecting officer shall receive taxes at the times and places set forth in the notice of receipt of the tax roll and warrant and at any other time or place during usual business hours during the period of collection."). In addition, we are unaware of any provisions of New York law that expressly prohibit counties from establishing reasonable regulations for the collection of delinquent property taxes, although at least one provision permits a county to set a method of payment where a county acts as a tax [*476] collection agency and collects taxes in installments. *See N.Y. Real Prop. Tax Law § 973* (authorizing payment "in installments as provided in the local law enacted by the county").

> 9 We note that the Comptroller's opinion is addressed to "town[s]," not counties, but we need not address the legal significance this distinction may have, if any.

More important, the Miners have not explained how the prohibition of payment by personal check prevented them from paying their overdue taxes after they received the notice of foreclosure. [**30] The notice of foreclosure, which was sent in October 2005, stated the County's payment policy months in advance of the final date of redemption in January

2006 and the default judgment in March 2006. The Miners, who concede that they received this notice, had ample time to obtain a certified check or a money order but failed to pay their overdue taxes in *any* form. Under these circumstances, the Miners were not deprived of their right to due process.

CONCLUSION

For the reasons stated above, we **AFFIRM** the judgments of the District Court.

IN THE MATTER OF THE FORECLOSURE OF TAX LIENS BY CLINTON COUNTY. CLINTON COUNTY, Respondent; and VALERIE MINER ET AL., Appellants.
501575.
Appellate Division of the Supreme Court of New York, Third Department.
Decided and Entered: April 12, 2007.

Appeal from an order of the County Court of Clinton County (McGill, J.), entered June 8, 2006, which denied respondents' motion to reopen a default judgment of tax foreclosure against them.

Mark A. Schneider, Plattsburgh, for appellants.

Maynard, O'Connor, Smith & Catalinotto, L.L.P., Albany (Robert Rausch of counsel), for respondent.

Before: Mercure, J.P., Peters, Mugglin and Kane, JJ.

MEMORANDUM AND ORDER

KANE, J.

On March 10, 2006, County Court issued a default judgment of foreclosure, pursuant to RPTL 1136, awarding petitioner possession of and title to respondents' real property based on their failure to pay taxes. On March 30, 2006, respondents moved to reopen pursuant to RPTL 1131. The court denied the motion, resulting in respondents' appeal. Although respondents timely moved to vacate the default judgment, we affirm because they failed to proffer an excuse for their default or a meritorious defense.

RPTL 1131 states that a motion to reopen a default judgment of foreclosure may not be brought later than one month after entry of the judgment, but it does not set forth the grounds that must support such a motion. We have previously held that even though CPLR 5015 contains a longer time period in which a party must

move for relief from a default judgment, the shorter time provision of RPTL 1131 applies to defaults in tax foreclosure proceedings (see CPLR 101; Matter of Foreclosure of Tax Liens by Clinton County [Zachary], 299 AD2d 709, 710 [2002], lvs dismissed 99 NY2d 610 [2003], 100 NY2d 574 [2003]). Notably, the one-month period was added to RPTL 1131 as a technical amendment and was intended merely as a timing device (see Mem of Div of Equalization and Assessment, Bill Jacket, L 1994, ch 532, at 5, 6, 14).

While it contains a specific timing provision, RPTL 1131 does not address the grounds for a motion to reopen a default judgment in tax foreclosure proceedings, making the grounds provisions of CPLR 5015 applicable (see CPLR 101). Respondents were therefore required to proffer a reasonable excuse for their default, as well as a meritorious defense (see CPLR 5015 [a] [1]; Guariglia v. Price Chopper Operating Co., 13 AD3d 1028, 1029 [2004]). As respondents' motion papers failed to establish any reasonable excuse or defense, the court properly denied the motion to reopen even though it was made within one month of entry of the judgment (see Matter of County of Herkimer [Jones], 34 AD3d 1327, 1328 [2006]).

We will not address respondents' arguments concerning alleged defects in the notice, as these arguments were raised for the first time in their reply brief on appeal (see Matter of Deuel v. Dalton, 33 AD3d 1158, 1159 [2006]).

Mercure, J.P., Peters and Mugglin, JJ., concur.

ORDERED that the order is affirmed, without costs.